

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

BARRY LOUIS LAMON,

Plaintiff,

v.

MCTAGGART, *et al.*,

Defendants.

Case No. 1:22-cv-01421-ADA-BAM (PC)

ORDER NOTIFYING PARTIES THAT  
NINETY-DAY PERIOD WITHIN WHICH TO  
FILE MOTION FOR SUBSTITUTION HAS  
BEEN TRIGGERED BY FILING OF NOTICE  
OF SUGGESTION OF DEATH AND PROOF  
OF SUFFICIENT SERVICE

(ECF No. 33)

**Motion for Substitution of Defendant Tillery  
Due: January 9, 2024**

Plaintiff Barry Louis Lamon ("Plaintiff") is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983. This action was removed from Kings County Superior Court on November 3, 2022. (ECF No. 1.) The second amended complaint has not yet been screened.

On April 4, 2023, Defendants filed a notice of suggestion of death of Defendant Tillery. (ECF No. 12.) Finding that there was no declaration of service or other proof reflecting that there was proper service of the notice on Defendant Tillery's successor or representative as provided by Federal Rule of Civil Procedure 4, on August 21, 2023 the Court notified the parties that the ninety-day period for filing a motion for substitution had not yet been triggered. (ECF No. 30.)

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1 Plaintiff then filed a motion for substitution of service requesting an order directing the  
2 United States Marshal's Office to conduct substituted service upon Defendant Tillery's next of  
3 kin. (ECF No. 31.) The Court denied the motion, without prejudice, finding that substituted  
4 service was not appropriate where it did not appear that any attempts at personal service had been  
5 made, and directed Defendants to file a status report indicating the status of re-service of the  
6 notice of suggestion of death on Defendant Tillery's next of kin or their intention regarding  
7 service. (ECF No. 32.)

8 Currently before the Court is Defendants' status report, filed October 11, 2023, indicating  
9 that Defendant Tillery's next of kin, Michael Tillery, was served with the notice of suggestion of  
10 death on October 3 in accordance with Federal Rule of Civil Procedure 4(e)(2). (ECF No. 33.)  
11 The status report and proof of service on Michael Tillery were also served on Plaintiff on October  
12 11, 2023. (*Id.* at 5.)

13 Federal Rule of Civil Procedure 25(a)(1) provides for the dismissal of Defendant Tillery  
14 from this action if a motion for substitution is not made within ninety days after service of a  
15 statement noting Tillery's death. Fed. R. Civ. P. 25(a)(1). Two things are required of a party for  
16 the running of the ninety-day period to commence: a party must 1) formally suggest the death of  
17 the party on the record, and 2) serve the suggestion of death on the other parties and the nonparty  
18 successors or representatives of the deceased. *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir.  
19 1994). In order for the ninety-day period for substitution to be triggered, a party must formally  
20 suggest the death of the party upon the record, Fed. R. Civ. P. 25(a)(1), and must serve other  
21 parties and nonparty successors or representatives of the deceased with a suggestion of death in  
22 the same manner as required for service of the motion to substitute, Fed. R. Civ. P. 25(a)(3).  
23 Thus, a party may be served with the suggestion of death by service on his or her attorney, Fed.  
24 R. Civ. P. 5(b), while non-party successors or representatives of the deceased party must be  
25 served the suggestion of death in the manner provided by Rule 4 for the service of a summons.  
26 Fed. R. Civ. P. 25(a)(3); *Barlow*, 39 F.3d at 232–34. Rule 25 requires dismissal absent a motion  
27 for substitution within the ninety-day period only if the statement of death was properly served.  
28 *Unicorn Tales, Inc., v. Bannerjee*, 138 F.3d 467, 469–71 (2d Cir. 1998).

1 With the filing of Defendants' status report and proof of service on Michael Tillery, the  
2 Court finds that the ninety-day period for filing a motion for substitution of Defendant Tillery has  
3 been triggered as of October 11, 2023.

4 As with the notice of suggestion of death, any motion for substitution must be served on  
5 the non-party successor or representative of Defendant Tillery as required by Federal Rule of  
6 Civil Procedure 4, by personal service. Fed. R. Civ. P. 25(a)(3). The Court notes that although  
7 Plaintiff is not proceeding *in forma pauperis* in this action, he may file a request for a court order  
8 that personal service be made by the United States Marshals Service pursuant to Federal Rule of  
9 Civil Procedure 4(c)(3).

10 Based on the foregoing, the Court HEREBY ORDERS as follows:

- 11 1. The parties are NOTIFIED that the ninety-day period for substitution of Defendant Tillery  
12 pursuant to Rule 25(a)(1) has been triggered by Defendants' notice of suggestion of death  
13 and proof of service on Michael Tillery, (ECF Nos. 12, 33);
- 14 2. Any motion for substitution of Defendant Tillery, made by any party, SHALL be filed and  
15 served on all parties and personally served on the non-party successor or representative of  
16 Defendant Tillery, on or before **January 9, 2024**; and
- 17 3. **If no motion for substitution of Defendant Tillery is filed by any party on or before**  
18 **January 9, 2024, Defendant Tillery will be dismissed from this action pursuant to**  
19 **Federal Rule of Civil Procedure 25(a)(1).**

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21 IT IS SO ORDERED.

22 Dated: October 12, 2023

23 /s/ Barbara A. McAuliffe  
24 UNITED STATES MAGISTRATE JUDGE  
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